

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2523 OF 2007

The Municipal Corporation For The)
City of Thane Through its Commissioner)
A Body Corporate constituted under)
The provisions of B.P.M.C Act, 1949,)
and having its office at : Mahapalika)
Bhavan, Chandanwadi, Panchpakhadi,)
Thane, Taluka & District Thane.)-Petitioner

Versus

Shri Bhaskar Pundlik Patil,)
Age: 55 Yrs., Occ: Retired,)
Office at: Radha Pundlik Apartment,)
Behind Bhimabai Apartment,)
Vitawa, Koliwada Road, Vitawa,)
Thane (W).)-Respondent

**ALONGWITH
WRIT PETITION NO.2219 OF 2007**

The Municipal Corporation For The)
City of Thane Through its Commissioner)
A Body Corporate constituted under)
The provisions of B.P.M.C Act, 1949,)
and having its office at : Mahapalika)
Bhavan, Chandanwadi, Panchpakhadi,)
Thane, Taluka & District Thane.)-Petitioner

Versus

Shri Chandrakant Maruti Kini,)
Age: 33 Yrs., Occ: Business,)
R//at: Saya Park, Kharegaon,)
Kalwa (W), Thane, District Thane.)-Respondent

**ALONGWITH
WRIT PETITION NO.2588 OF 2007**

The Municipal Corporation For The)
City of Thane Through its Commissioner)
A Body Corporate constituted under)
The provisions of B.P.M.C Act, 1949,)
and having its office at : Mahapalika)
Bhavan, Chandanwadi, Panchpakhadi,)
Thane, Taluka & District Thane.)-Petitioner

Versus

Shri Parmeshwar Limbaji Gaikwad,)
Age: 42 Yrs., Occ: Business,)
R/at.: 'A' Building, B/06,)
1st Floor, Shivsrishti Co-operative)
Housing Society, Kharegaon, Kalwa,)
Thane, District Thane.)-Respondent

**ALONWITH
WRIT PETITION NO.2132 OF 2007**

- 1.The Municipal Corporation For The)
City of Thane Through its Commissioner)
A Body Corporate constituted under)
The provisions of B.P.M.C Act, 1949,)
and having its office at : Mahapalika)
Bhavan, Chandanwadi, Panchpakhadi,)
Thane, Taluka & District Thane.)
- 2.Ward Officer,)
Uthalsar Prabhag Samiti,)
Thane 400 602.)-Petitioners

Versus

- 1.Shri Moiz Mohosin Masalawala,)
Age: 36 Yrs., Occ: Business,)
R/at.:Archana Palace, 'A' Wing,)
Flat No.401, Anand Koliwada,)
Mumbra, Kausa, Thane.)
- 2.Shri Zahid Y. Tambe,)
Age: 42 Yrs., Occ: Service,)
R/at.:Latefa Palace, Room No.3,)
Thane.)
- 3.Shri Mohammad Abbas Dhanerwala,)
Age:26 Yrs., Occ: Business,)
R/at.:Vishal Apartment, 4th Floor,)
Near Buradhani Hospital, Mumbra.)
- 4.M/s.Sunder Enterprises,)
A Proprietary concern of)
Mr.Azeen Abdula Petkar,)
Age: Adult, Occ: Business,)
R/at.:2nd Floor, Room No.9,)
Shiv Samrat Housing Ltd.,)
Old Belapur Road, Kalwa,)
Thane (W).)

- 5.Smt.Shalini M. Raut,)
Age: Adult, R/at.: Sohan Tower,)
Flat No.302, A-Wing, 3rd Floor,)
Khopat Shivsena Branch, Thane.)
- 6.Sau.Meena Pravin Mantri,)
Age:52 Yrs., R/at.:B-9, Suryaprakash)
Society, Near Three Petrol Pump,)
Tekdi Bungalow, Naupada,)
Thane.)-Respondents

**ALONGWITH
WRIT PETITION NO.3682 OF 2007**

The Municipal Corporation For The)
City of Thane Through its Commissioner)
A Body Corporate constituted under)
The provisions of B.P.M.C Act, 1949,)
and having its office at : Mahapalika)
Bhavan, Chandanwadi, Panchpakhadi,)
Thane, Taluka & District Thane.)-Petitioner

Versus

- 1.Shri Madhukar Laxman Patil,)
An Adult, Occ:Agriculture & Business,)
R/at.Madhukar Niwas, Vitawa,)
Koliwada, Post Kalwa, Vitawa,)
Thane 400 605.)
- 2.Shri Rajaram Chandrakant Aryamane,)
Age: Adult, Occ: Business,)
R/at.: Parvati Apartment,)
Near Maruti Temple,)
Post Kalwa, Vitawa, Thane 400 605.)-Respondents

Shri R.S.Apte for the Petitioner in all the Petitions.

CORAM : ABHAY S. OKA, J.

**DATE ON WHICH SUBMISSIONS
ARE HEARD. : MAY 04, 2007.**

**DATE ON WHICH JUDGMENT IS
PRONOUNCED. : JUNE 07, 2007.**

JUDGMENT:

1. These Petitions under Article 227 of the Constitution of India can be disposed of by a common order considering the nature of grievances made in these Petitions. These Petitions have been filed by the Municipal Corporation constituted under the provisions of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the said Act of 1949). The said Municipal Corporation is also a Planning Authority within the meaning of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the said Act of 1966). The main grievance made in these Petitions is regarding the manner in which the Civil Courts and District Courts have passed ad-interim orders in suits where the challenge is to action of demolition of unauthorised structures sought to be taken by the Petitioner Municipal Corporation.

2. Shri Apte, learned counsel appearing for the Petitioner-Corporation has invited my attention to facts in each Petition and pointed out that ad-interim orders have been passed by the Courts below mechanically as a result of which action of demolition could not be taken against the unauthorised constructions. He has invited my attention to the various decisions of this Court and the Apex Court.

3. Coming to the fact of the individual case, in Writ Petition No.2523 of 2007 the challenge is to ad-interim orders passed by the District Court in an Appeal preferred by the Respondent herein for challenging an order passed by the trial Court of rejecting the Application for temporary injunction. On 30th September, 2006, a suit was filed by the Respondent for injunction restraining the Petitioner from taking action of demolition in respect of the structure bearing No.328 situated at Vitawa Koliwada, Thane. It is pointed out that on 02nd November, 2006, the Petitioner filed written statement to the suit pointing out that the construction subject matter of the suit was completely unauthorised. It is also brought on record in the written statement that action under section 260 and 268 of the said Act of 1949 was taken by the Petitioner by issuing notices. The Application for temporary injunction was rejected by the trial Court on 20th January, 2007. An Appeal was preferred by the Respondent-Plaintiff on 02nd February, 2007. On 03rd February, 2007, on the Application for temporary injunction made in the Appeal, the District Court passed an ad-interim order of status-quo which was extended thereafter. An Application at Exhibit 13 was made in the Appeal on

05th March, 2007 on which the learned District Judge passed an order extending the order of status-quo granted earlier till next date. On 12nd March, 2007 and on 21st March, 2007 notwithstanding the strong objection raised by the Petitioner, the order of status-quo was extended. The said three orders are challenged by the Petitioner by filing the Petition.

4. In Writ Petition No.2219 of 2007, the Respondent filed a suit for injunction restraining the Petitioner from taking action of demolition in respect of the structure known as "Saya Park" at Kalva, Thane. On 05th October, 2006 an ad-interim order of status-quo was passed by the trial Court. On 16th November, 2006 the Petitioner filed written statement which was adopted as a reply to the Application for temporary injunction by pointing out that illegal construction has been carried out on a plot reserved for garden. On 23rd January, 2007 the Application for temporary injunction in the suit was rejected by the trial Court. On 06th February, 2007, Misc. Civil Appeal No.15 of 2007 was filed by the Respondent in the District Court in which ex-parte ad-interim order of status-quo was passed. On 22nd February, 2007, the Advocate for the Petitioner appeared before the Appellate Court and pointed out that due process of

law was followed by the Petitioner before initiating the action. It appears that the Appellate Court did not extend the ad-interim order. It appears that another suit was filed being Special Civil Suit No.159 of 2007 for injunction in respect of same building. The said suit was filed in the trial Court on 01st March, 2007 in which ex-parte ad-interim injunction was granted. A third suit being Special Civil Suit No.167 of 2007 was filed in the trial Court on 03rd March, 2007 by the Plaintiff therein for injunction in respect of same building in which an ex-parte injunction was granted. It is stated in the Petition that on 12th March, 2007 the Petitioner appeared and filed written statement and reply pointing out that the said suit was the third suit in respect of the said structure. The grievance in the Petition is that order of status-quo was extended on 12th March, 2007, 20nd March, 2007, 30th March, 2007 and 10th April, 2007 in the said Special Civil Suit No.167 of 2007 without any application of mind and without considering the facts of the case.

5. Writ Petition No.2588 of 2007 relates to orders of status-quo passed in the second suit in respect of the building Saya Park i.e Special Civil Suit No.159 of 2007. Ad-interim order of status-quo

granted on 01st March, 2007 was extended by the trial Court on 12th March, 2007, 20th March, 2007, 29th March, 2007 and 10th April, 2007.

6. Writ Petition No.2132 of 2007 takes exception to ad-interim orders passed by the District Court in an Appeal preferred by the Respondents (original Plaintiffs) for challenging the order passed by the trial Court by which an application for temporary injunction made by the Petitioners was rejected by the trial Court. The suit filed by the Respondents relates to construction of a building on final plot No.453 at Panchpakhadi, Thane. The suit was filed by the Respondents on 04th August, 2006. On the returnable date i.e 09th August, 2006, the Petitioner appeared and filed written statement and a reply pointing out that the documents produced by the Respondent were fabricated. The contention of the Petitioners appears to be that though the sanctioned plan related to four floors, after order of status-quo was passed by the Court on 09th August, 2006, seven floors were illegally constructed. It is pointed out in the Petition that the suit was adjourned from 22nd August, 2006 from time to time at least on thirteen various dates and ad-interim order was extended. The Application for temporary injunction was rejected on

12th December, 2006. On the very next day, an Appeal was preferred by the Respondents in which ad-interim order of status-quo was passed. On 22nd December, 2006 and 11th January, 2007 the Appellate Court extended the order of status-quo. It is pointed out that on 22nd December, 2006 the Appellate Court continued the order status-quo till further orders. On 15th January, 2007 on the Application made by the Petitioner, the Appeal was ordered to be placed for hearing on 17th January, 2007. It is pointed out in the Petition that after 17th January, 2007, the Appeal was adjourned on eight different dates as a result of which the order of status-quo continues to operate.

7. Writ Petition No.3628 of 2007 relates to order passed by the trial Court in a suit filed by the Respondents. In the suit challenging action of demolition of unauthorised construction, notwithstanding the objection raised by the Petitioner, ad-interim order of status-quo was passed and was continued from time to time.

8. In these Petitions we are concerned with Applications under Order XXXIX Rule 1 and 2 filed by the original Plaintiffs seeking injunction restraining the Petitioner-Municipal Corporation from taking

action of demolition in respect of alleged unauthorised structures. Under proviso to Rule 3 of Order XXXIX, whenever it is proposed to grant an injunction without notice to the opposite party, Court is under an obligation to record reasons for its opinion that the object of granting injunction would be frustrated by delay. Under Rule 3A of Order XXXIX the Court has to make an endeavour to finally decide the Application for injunction within thirty days from the date on which ad-interim injunction was granted and where the Court is unable to do so, reasons are required to be recorded.

9. The provision of Rule 3A regarding disposal of the Application within thirty days is surely not mandatory and it is directory in the nature. However, the Courts cannot overlook the very object of framing Rule 3A. The first part of Rule 3A may not be mandatory but the later part makes it obligatory for the Court to record the reasons as to why application for temporary injunction could not be disposed of within thirty days. It is a matter of taking judicial notice that every Civil Court in the State is affected by a very serious problem of overflowing dockets and it is difficult for the Civil Judges to cope up with pressure of work as in bigger cities, large number of

suits are being filed relating to actions of demolition of structures/unauthorised constructions by the local authorities. In many cases, reply is not filed by the contesting Defendants within a reasonable time. There are various reasons which prevent Civil Courts from disposing of the injunction applications within the stipulated period of thirty days.

10. In the present Writ Petitions we are dealing with cases where written statement was filed promptly by the local authority. It is always argued that once an ad-interim order is granted for protecting the suit structure, till such time the application for temporary injunction is not heard, the suit structure has to be protected. However, there are cases in which the circumstances are glaring. There are cases where, ex facie, on plain reading of the plaint the suit of structure is found to be constructed without permission. There are cases where adjudication as regards legality of the same structure is already made in earlier suits. Therefore, where ad-interim order is initially granted for protection of alleged unauthorised structure, and when Court is not in a position to take up for hearing the Application for temporary injunction immediately after a reply is filed by the local authority, the ad-interim order

cannot be mechanically extended. In appropriate cases the trial Court for reasons recorded can always refuse to extend the ad-interim order.

11. In some cases, at the outset statements are made by the local authorities stating therein that the authorities will take recourse to due process of law before the action of demolition is taken. In the case of **Abdul Hasan Shaikh Mansuri Vs. Municipal Corporation of Mumbai & Ors (First Appeal No.2426 of 2005)** in Judgment and Order dated 02nd March, 2006, the learned single Judge had an occasion to deal with a similar case. The learned Judge was dealing with a case where a limited protection was sought by the Plaintiff restraining the local authority from demolishing the structure without following due process of law. The learned single Judge observed thus:

"Instead, such a suit can be disposed of on the first date of hearing on the statement to be made on behalf of the Authority that the due process of law will be followed. Soon thereafter the legal process against the structure can be proceed with and taken to its logical end".

Another observation of the learned single Judge in that behalf is relevant:

"10. Indeed, it is possible that in a given case, taking advantage of such statement to be made by the Authority the unscrupulous plaintiff may carry on some unauthorised construction or extend the existing structure. To obviate such a situation, the plaintiff shall be obliged to produce on record, on affidavit, the latest photographs showing all the dimensions of the suit structure and the plans thereof to be certified by a licensed Architect, so that the onus will rest on the plaintiff if any additional construction is noticed later on during the action before the Authority or the court of law and such plaintiff can be denied the equitable relief as also proceeded against for appropriate action, civil and criminal".

12. In a given case there may be valid reasons due to which the learned trial Judge is unable to decide the Application for temporary injunction

expeditiously. In such cases, though he may be justified in extending ad-interim order, he cannot do so mechanically and he has to apply his mind while extending the ad-interim order. Even while extending the ad-interim order, in a given case, the learned Judge has to ensure that on the basis of the ad-interim order, no further construction is carried out by the Plaintiff. While granting and continuing ad-interim order, the Court can always mould the relief suitably.

13. The mandate of Rule 3A of Order XXXIX of the said Code has to be always kept in mind by the learned Judges and especially in cases where the challenge is to action of demolition of unauthorised structures. It is well known fact that every major city in the State has been affected by menace of illegal constructions. Therefore, the Courts have to ensure that the applications for injunction for preventing demolition of alleged unauthorised structures are disposed of expeditiously.

14. In Appeals which are preferred by either parties challenging orders of passed on applications for temporary injunctions in suits relating the alleged unauthorised structures, the Appellate Courts

are required to dispose of the Appeals keeping in mind the object of Rule 3A of Order XXXIX of the said Code. Such Appeals have to be disposed of expeditiously by giving necessary priority. Since Appeal is against an interim order, the Appellate Courts should normally avoid calling for the record from the trial Court and can direct the parties to file a paperbook of all the material documents on record of the trial Court. Prior to coming into force of the Code of Civil Procedure (Amendment) Act, 1999 under Sub-rule 1 of Rule 11 of Order XLI of the said Code, it was mandatory to send for the record even before dismissing the Appeal without notice to the Respondent. However, Sub-rule 1 has been deleted by the said Amendment Act of the year 1999 which came into force on 01st July, 2002.

15. Therefore, in case of such Appeals, the Appellate Court can dispense with the requirement of sending for record of the trial Court so that Appeals can be disposed of expeditiously. By dispensing with the paper book prepared through Court, the Appellate court can always direct the parties to file a private paper book. The Appellate Court has to expeditiously dispose of the Appeals arising out of such orders of temporary injunction. In a given case if sending for

the record is very essential, the Appellate Court can always ensure that the record is sent by the concerned trial Court within the time stipulated by the Appellate Court. Even during the pendency of such Appeals, the ad-interim orders for protecting alleged unauthorised structures cannot be extended mechanically without considering the peculiar facts of the case.

16. In the case of **M.I.Builders Pvt. Ltd Vs. Radhey Shyam Sahu & Ors. [(1999) 6 Supreme Court Cases Page 464]** the Apex Court has held that no consideration should be shown to any person who indulges in unauthorised construction. The Apex Court had held that unauthorised construction, if it is illegal and cannot be compounded, has to be demolished and there is no way out. The mandate laid down by the Apex Court has to be considered by the concerned Courts.

17. Subject to what is stated above, these Petitions can be disposed of by directing the concerned Courts to decide the pending Application/Appeals as expeditiously as possible.

18. Hence, I pass the following order:

- (i) In view of what is observed in this Judgment the concerned Courts will dispose of the pending Application/Appeals subject matter of the Petitions as expeditiously as possible.
- (ii) All questions on merits of the pending suit are expressly kept open.

JUDGE